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EXAMINER				
HAND, MELANIE JO				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* EMMANUELLE CECILE DAMAY, RENEE S. KOLE,  
LYNN MARIE MATHEUS, LIGIA A. RIVERA,  
TIMOTHY JAMES VAN HIMBERGEN,  
MARGARET GWYN LATIMER, and FRANZ ASCHENBRENNER

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Appeal 2009-011960  
Application 10/753,974  
Technology Center 3700

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Before WILLIAM F. PATE, III, MICHAEL W. O'NEILL, and  
FRED A. SILVERBERG, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

### STATEMENT OF THE CASE

Emmanuelle Cecile Damay et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision finally rejecting claims 1-10 and 14-17 under 35 U.S.C. § 102(b) as anticipated by, or in the alternative, under 35 U.S.C. § 103(a) as unpatentable over Becker (US 4,657,538, issued Apr. 14, 1987), claims 11-13 and 22 under 35 U.S.C. § 103(a) as unpatentable over Becker, and claims 18-20 under 35 U.S.C. § 103(a) as unpatentable over Becker in view of Fell (US 2004/0253894 A1, publ. Dec. 16, 2004). We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE.

#### *The Invention*

The claims on appeal relate to a disposable absorbent liner for use in a crotch portion of underwear.

Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A disposable absorbent liner for use in a crotch portion of underwear comprising:
  - a cover layer having a top surface and an opposite bottom surface, the cover layer comprising a mixture of hydrophilic microfibers and hydrophobic microfibers, wherein a quantity of hydrophilic microfibers and hydrophobic microfibers are located at the top surface and a quantity of hydrophobic microfibers located at the top surface is larger than a quantity of hydrophilic microfibers located at the top surface, based on a total weight of the mixture of microfibers in the cover layer;
  - a removable backing layer;
  - a liquid impermeable baffle layer having a top surface and an opposite bottom surface with the baffle layer being disposed between the cover layer and the backing layer; and,

wherein the absorbent liner has a low profile and an Absorbent Capacity in the range of about 2 grams to about 10 grams.

## DISCUSSION

A determination of anticipation or obviousness begins with claim construction, followed by a comparison of the construed claim to the prior art. *Key Pharm. v. Hercon Labs. Corp.*, 161 F.3d 709, 714 (Fed. Cir. 1998).

The first matter that needs to be addressed is claim construction. Based on the positions of the Examiner and Appellants, we need to construe the term “quantity.”

The Specification does not assign a particular definition to the term “quantity.” As such, we consult a general dictionary for guidance to determine its ordinary and customary meaning to a person of ordinary skill in the art. *Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1348 (Fed. Cir. 2010).

“A quantity” is generally defined, relevant to its use in the Appellants’ Specification, as “the aspect in which a thing is measurable in terms of greater, less, or equal or of increasing or decreasing magnitude.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 10<sup>TH</sup> EDITION (1999). In contrast, “zero” is defined as “denoting the absence of all magnitude or quantity.” *Id.* As such, “a quantity” of a thing cannot include “zero” of the thing.

Therefore, the claim limitation of “a quantity of hydrophobic microfibers located at the top surface is larger than a quantity of hydrophilic microfibers located at the top surface” requires, at the top surface, the quantity of hydrophobic microfibers to be greater than the quantity of hydrophilic microfibers and “the quantity” of either type of microfiber

cannot be zero. With this construction in mind, we compare the properly construed claim to the prior art, Becker.

While the Examiner correctly looks to apply the broadest reasonable interpretation of the claim terms under examination, we remind the Examiner that it is also necessary to properly construe what an applied reference *fairly* teaches or discloses. *See, e.g., In re Fracalossi*, 681 F.2d 792 (CCPA 1982). In this case, the Examiner finds Becker's Example 1, in which the outer cover fabric is composed of 24% pulp and 76% conjugate fibers having polyester core and a high density polyethylene sheath, constitutes a top surface having a quantity of hydrophilic fibers (the pulp) and a quantity of hydrophobic fibers (the polyester-polyethylene conjugate fibers). Ans. 4 and 16. Appellants disagree with the Examiner's findings that Becker's Example 1 outer cover fabric has quantities of both hydrophilic and hydrophobic fibers. App. Br. 4. We find that Becker fails to disclose that the conjugate fibers in Example 1 are hydrophobic. Instead, Becker discloses that the flow retarding means is made from polypropylene fibers, which have been disclosed in Becker as hydrophobic. The Examiner has provided no other evidence to support the finding that, when Becker is read by a person of ordinary skill in the art, Becker fairly teaches or discloses in Example 1 that the conjugate fibers of polyester-polyethylene is hydrophobic. As such, the Examiner's finding is without foundation and appears conclusory.

Accordingly, Becker appears not to disclose a cover layer having a top surface with the quantity of hydrophobic microfibers greater than the quantity of hydrophilic microfibers as recited within the independent claims.

The Examiner's reliance on Becker or Fell for the want of nonobviousness does not remedy this deficiency within Becker concerning the relative quantities of hydrophobic and hydrophilic microfibers within the top surface of the cover layer.

### CONCLUSION

In view of the foregoing, we are constrained to reverse all of the anticipation and obviousness rejections of the Examiner.

### DECISION

The Examiner's decision to reject claims 1-20 and 22 is reversed.

### REVERSED

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